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NOTES.

PROPERTY RIGHTS UNDER THE RESERVED POWER AND STOCKHOLDERS' RIGHT TO VOTE.—A corporate charter is in the nature of a threefold contract between the State and the corporation, the State and the corporators, and the corporators themselves.[1] The proposition has been advanced, though conceding the conflict among the authorities, that any alteration of the charter under the reserved power, affecting the contract of the State with the corporation or the corporators is not objectionable under the impairment of contract clause,[2] while an alteration of the contract between the corporators themselves is within the constitutional prohibition.[3] Likewise, it has been argued that, while all property rights conferred by the State may be taken without violating the Fourteenth Amendment, those arising from the contract between the corporators may not.[4] If the lat-

[1]Trustees of Dartmouth Col. *v.* Woodward (1819) 4 Wheat. 518; Clearwater *v.* Meredith (1863) 1 Wall. 25; Loewenthal *v.* Rubber Co. (1894) 52 N. J. Eq. 440.

[2]U. S. Const. Art. I, § 10.

[3]7 COLUMBIA LAW REVIEW 598; 53 Amer. Law Reg. 73.

[4]53 Amer. Law Reg. 1.

ter contract is not subject to alteration, it would follow that property rights created thereby could not be infringed. But where the contract is viewed as made subject to the power to amend, a condition on which the charter is considered to have been granted, the problem becomes substantially the same as where the property right is created by the State. That the State cannot exercise the reserved power in derogation of the Fourteenth Amendment is everywhere admitted.[5] On the other hand, the legislature may annex a condition to a property right which it confers. From a historical standpoint, it would appear that the power to amend, being reserved for the purpose of avoiding conflict with the impairment of contract clause,[6] was not intended to be a condition imposed upon property rights.[6] This interpretation is the basis of cases which hold on the one hand, that mere governmental exemptions in the nature of licenses are within the purview of the reserved power,[7] and, on the other, that special franchises, as property, are beyond its scope.[8]

The same attitude seems to underlie the decisions protecting a shareholder's investment when not clearly subject to a condition.[9] Thus, amendments increasing the liability of shareholders, authorizing a leasing of the corporate property, or consolidation with another company, have been held unconstitutional.[10] But where the court could find the property right to have been acquired subject to the condition, like amendments have been sustained.[11] That a majority of the shareholders cannot, by altering the character of the company's business, foist a new investment upon a protesting shareholder is well settled.[12] The legislative attempt to accomplish this result under the reserved power, though perhaps justifiable under the contract clause, seems to be virtually compelling one to embark in an enterprise against his will, and, therefore, to be an unconstitutional interference with property rights.[13] Even the courts which assume a liberal view of what is a fundamental change do not deny the validity of this principle.[14] Properly considered these decisions would seem to be

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[5]Opinion of the Justices (1891) 66 N. H. 629; R. R. Tax Cases (1882) 13 Fed. 722; (1883) 18 Fed. 385; Matter of Cable Co. (N. Y. 1886) 40 Hun. 1; Ohio *v.* Neff (1895) 52 Oh. St. 375; Stearns *v.* Minn. (1900) 179 U. S. 223, 259.

[6]See Tomlinson *v.* Jessup (1872) 15 Wall. 454; R. R. Tax Cases *supra.*

[7]R. R. Co. *v.* Georgia (1878) 98 U. S. 359; Adirondack Ry. Co. *v.* N. Y. (1899) 176 U. S. 335; Fell *v.* State (1874) 42 Md. 71; *Cf.* 7 COLUMBIA LAW REVIEW 414.

[8]People *v.* O'Brien (1888) 111 N. Y. 1; Detroit *v.* D. & H. P. R. Co. (1880) 43 Mich. 140; *Cf.* 9 COLUMBIA LAW REVIEW 160.

[9]See O. & L. R. R. Co. *v.* Veazie (1855) 39 Me. 571; Hill *v.* G. R. Co. (1888) 41 Fed. 610; Fisher *v.* Patton (1895) 134 Mo. 32.

[10]Enterprise Co. *v.* Moffitt (1899) 58 Neb. 652; Garey *v.* Joe Mining Co. (1907) 32 Utah 497; Black *v.* D. & R. Canal Co. (1873) 24 N. J. Eq. 455; Cent. Trans. Co. *v.* Pullman's Car Co. (1891) 139 U. S. 24; Lauman *v.* L. V. R. R. Co. (1858) 30 Pa. St. 42.

[11]Matter of Oliver Lee and Co.'s Bank (1860) 21 N. Y. 9; aff'd. *sub nom.* Sherman *v.* Smith (1861) 1 Black 587; Durfee *v.* O. C. & F. R. R. R. Co. (Mass. 1862) 5 Allen 230; Pa. Col. Cases (1871) 13 Wall. 190; Market St. Ry. Co. *v.* Hellman (1895) 109 Cal. 571; Bishop *v.* Brainerd (1859) 28 Conn. 288.

[12]Kean *v.* Johnson (N. J. Eq. 1853) 1 Stock. 407; N. O. J. & G. N. R. R. Co. *v.* Harris (1854) 27 Miss. 517.

[13]See Zabriskie *v.* H. & N. Y. R. R. Co. (1867) 18 N. J. Eq. 178; Mowrey *v.* D. & C. R. R. Co. (U. S. C. C. 1866) 4 Biss. 79; Black *v.* D. & R. Canal Co. *supra;* Snook *v.* Ga. Imp. Co. (1889) 83 Ga. 61; Dow *v.* Northern R. R. Co. (N. H. 1887) 36 Atl. 510; Kenosha R. R. Co. *v.* Marsh (1863) 17 Wis. 13; State *v.* Taylor (1896) 55 Oh. St. 61.

[14]See Mercantile Co. *v.* Kneal (1892) 51 Minn. 263; Bradley M'f'g. Co. *v.* Traction Co. (1907) 229 Ill. 170; Picard *v.* Hughey (1898) 58 Oh. St. 577; Sprigg *v.* Western Tel. Co. (1876) 46 Md. 67.

merely illustrative of the rule that a corporate charter is to be construed liberally in favor of the State.[15]

Like considerations lead to the conclusion that an amendment impairing the voting rights of a shareholder, and thereby curtailing his control of his investment, is not sustainable under the reserved power. The right to vote, as an essential incident of the ownership of stock,[16] following the legal title to the shares[17] and subject to the rules of property,[18] is itself a property right.[19] The gist of this property consists in the degree of corporate control that it confers.[19] The argument, therefore, that a "dilution" of the right is not a taking of it appears to involve a contradiction in terms. If the right itself is property, any diminution of its potency cannot but be *pro tanto* a taking within the prohibition of the Fourteenth Amendment.[20] The freedom with which courts recognizing these principles sometimes apply them, finds illustration in a recent case, *Lord* v. *Equitable Life Ass. Soc.* (N. Y. 1909) 87 N. E. 443, holding a statute[21] authorizing the mutualization of a stock insurance company, by the enfranchisement of all policyholders, to be a proper exercise of the reserved power. The court concedes the shareholder's voting right to be property. In fact, it holds a charter amendment, adopted under authority of the statute, which gave shareholders the right to elect only a *part* of the directors, to be improper as an impairment of that property. But the action of the legislature is sustained on the ground that since the original charter permitted limited mutualization, the statute did not substantially impair the property rights of the shareholders.

The difference in practical effect between limiting the number of directors for whom the shareholders are to vote and introducing a large number of new votes into the electorate is not apparent. Each weakens the voting strength of the shareholders, and, if the right to vote be property, is *pro tanto* a taking thereof. The citation, in support of the statute, of cases sustaining amendments providing for cumulative voting,[22] and for changing the number of directors to be voted for by certain shareholders,[23] is not convincing. Such amendments affect merely the manner of choosing directors by the shareholders themselves. Policy holders, on the other hand, are not members of the company.[24] The corporate prop-

[15]See Charles River Bridge *v.* Warren Bridge (1837) 11 Pet. 420; Fertilizing Co. *v.* Hyde Park (1878) 97 U. S. 659, 666.

[16]Taylor & Co. *v.* So. Pac. Co. (1903) 122 Fed. 147; Lamkin *v.* Palmer (N. Y. 1897) 24 App. Div. 255; aff'd 164 N. Y. 201; Kinnan *v.* Sullivan C'ty Club (N. Y. 1898) 26 App. Div. 113; Sullivan *v.* Parkes (N. Y. 1902) 69 App. Div. 221.

[17]Comth. *v.* Dalzell (1893) 152 Pa. St. 217; Miller *v.* Murray (1892) 17 Colo. 408.

[18]Moses *v.* Scott (1887) 84 Ala. 608; Allen *v.* Hill (1860) 16 Cal. 113; Market Street Ry. Co. *v.* Hellman, *supra;* In re Election of Cape May etc. Co. (1888) 51 N. J. L. 78; Matter of Barton (N. Y. 1831) 6 Wend. 509.

[19]Stokes *v.* Continental Trust Co. (1906) 186 N. Y. 285, 296; notes 16, 17, 18, *supra.*

[20]See Orr *v.* Bracken C'ty (1884) 81 Ky. 593; Pumpelly *v.* Green Bay Co. (1871) 13 Wall. 166; People *v.* Otis (1882) 90 N. Y. 48; Matter of Jacobs (1885) 98 N. Y. 98; L. I. R. R. Co. *v.* Garvey (1899) 159 N. Y. 334.

[21]N. Y. L. 1906, c. 326, § 13.

[22]Looker *v.* Maynard (1900) 179 U. S. 46; aff'g (1897) 111 Mich. 498; see *contra* State *v.* Greer (1883) 78 Mo. 188.

[23]Miller *v.* State (1872) 15 Wall. 478.

[24]People *v.* Surety Life Ins. etc. Co. (1879) 78 N. Y. 114, 122.

erty belongs ultimately to the shareholders,[25] and on them rest the corporate liabilities.[26] Policy holders are mere creditors, between whom and the company there exists not even a trust relationship.[27] No support can be found for the theory of the dissenting opinion that the mere enormity of the amounts due the creditors, as compared with the capital of the company, overturns these established principles. Cases cited by the court sanctioning the changing of a mutual into a stock company[28] are distinguishable, for the voting right taken in these cases was one in which it is not clear that the policy holders, who were deprived of it, had a property right. The case, then, must, in the last analysis, rest upon the mutualization clause in the original charter. The provision therein that the business should be conducted on the "mutual plan" is of slight importance as it would not in itself mean more than that the premiums should constitute a fund for the payment of losses.[29] The clause giving the directors power to enfranchise policy holders may perhaps be sufficient to sustain the result reached. But this clause, though a limitation upon the stockholders' right, authorized the enfranchisement only of those holding insurance to the amount of $5,000. It is difficult to see how the legislature could alter the limitation without substantially impairing property rights. The statute can be upheld only upon a most liberal interpretation of the clause in question, overruling the construction placed upon it by decisions rendered at an earlier stage of the litigation,[30] not directly involved in this appeal.

THE DETERMINATION OF CLASSES.—Seemingly a gift to the children of a person means to all his children. But the fact that the will speaks as of the testator's death, or that distribution is directed at some specified time, together with the aversion of the courts to delay in distribution, has led to various rules for determining when the class shall be closed. It may be stated generally that all members of such a class born before the time of distribution are included. When there is a direct gift of personalty, only those living at the testator's death take,[1] but if there are then no children, all, whenever born, are admitted.[2] The authorities are divided as to whether after-born children can ever be admitted where there is a devise of realty, but the better view seems to be that the same rule should apply to realty as to personalty.[3] When the gift is of a fixed

[25]Martin *v.* N. F. P. Mfg. Co. *et al.* (1890) 122 N. Y. 165, 172; Matter of Petition Argus Co. (1893) 138 N. Y. 557, 569.

[26]N. Y. Ins. Law §§ 41, 42.

[27]Everson *v.* Equitable Life Assur. Co. (1895) 61 Fed. 258; aff'd (1896) 71 Fed. 570; Pierce *v.* Equitable Life Assur. Soc. (1887) 145 Mass. 56; Berley *v.* Equitable Life Assur. Soc. (N. Y. 1881) 61 How. Pr. 344; Greeff *v.* Equitable Life Assur Soc. (1899) 160 N. Y. 19.

[28]Grobe *v.* Erie etc. Co. (N. Y. 1899) 39 App. Div. 183; Wright *v.* Minn. Ins. Co. (1904) 193 U. S. 657; Polk *v.* Mut. Res. Ass. (1807) 207 U. S. 310.

[29]Union Ins. Co. *v.* Hoge (1858) 21 How. 35, 64.

[30]Lord *v.* Equitable etc. Soc. (N. Y. 1905) 109 App. Div. 252; aff'g. 47 Miscel. 187. On the subject generally, see 17 Green Bag 353.

[1]Viner *v.* Francis (1789) 2 Cox 190. In Kentucky, after-born children share unless an intention to exclude is manifest. Lynn *v.* Hall (1897) 101 Ky. 738.

[2]Weld *v.* Bradbury (1715) 2 Vern. 705; Andrews *v.* Partington (1791) 3 B. C. C. 401.

[3]Theobald, Wills (6th Ed.) 303, 4.